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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1818

FORD MOTOR COMPANY, a Delaware Corporation,
Petitioner,

v.

COLONIAL FORD, INC., a Utah Corporation, *et al.*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Automobile Dealer Franchise Act

Pub. L. No. 1026, c. 1038, 70 Stat. 1125

(Approved August 8, 1956)

AN ACT

To supplement the antitrust laws of the United States, in order to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise automobile dealers to bring suit in the district courts of the United States to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith in complying with the terms of franchises or in terminating or not renewing franchises with their dealers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[15 U.S.C. §1221]

That, as used in this Act—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

[15 U.S.C. §1222]

SEC. 2. An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in

defense of any such action the failure of the dealer to act in good faith.

[15 U.S.C. §1223]

SEC. 3. Any action brought pursuant to this Act shall be forever barred unless commenced within three years after the cause of action shall have accrued.

[15 U.S.C. §1224]

SEC. 4. No provision of this Act shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

[15 U.S.C. §1225]

SEC. 5. This Act shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this Act and an express provision of State law which can not be reconciled.

Original Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 76-2079, 76-2080 and 76-2083

COLONIAL FORD, INC., a Utah Corporation,
Plaintiff, Appellee, Cross-Appellant,

v.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant, Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,
Defendant, Appellant, Cross-Appellee

(Argued March 17, 1978; Decided May 31, 1978)

Peter W. Billings, Jr., Salt Lake City, Utah *(Peter W. Billings, Stanford B. Owen, Ted D. Smith, Fabian & Clendenin*, Salt Lake City, Utah, *with him on brief)*, for defendant, appellant, Ford Motor Company.

Harold G. Christensen, Salt Lake City, Utah *(R. Brent Stephens, Snow, Christensen & Martineau*, Salt Lake City, Utah, and *George V. Burbach*, Dearborn, Mich., *of counsel, with him on brief)*, for defendant, appellant, cross-appellee, Ford Motor Credit Company.

Daniel L. Berman, Salt Lake City, Utah *(Richard W. Giauque*, and *Gordon Strachan*, of *Berman & Giauque*, Salt Lake City, Utah, *with him on brief)*, for plaintiff, appellee, cross-appellant, Colonial Ford, Inc.

Before SETH, Chief Judge, and DOYLE and McKAY, Circuit Judges.

SETH, Chief Judge.

Colonial Ford, Inc. brought this action against Ford Motor Company and Ford Motor Credit Company. There

were several causes of action alleged in the complaint; however, only two were submitted to the jury. These were a cause under Section 1 of the Sherman Act, and the second was under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221.

The plaintiff corporation had been a Ford dealer in Utah, and during most of the time here concerned, it was owned by LeGrande Belnap, as the principal owner, and by Marshall Pease who had a contract to buy a forty-nine percent interest from Mr. Belnap.

The defendant, Ford Motor Credit Company, is a wholly-owned subsidiary of Ford Motor Company, and provides financing to Ford dealers for cars and real estate. It also provides financing to a much lesser extent for undertakings not related to the automobile business. It had provided the financing for cars purchased by Colonial from Ford Motor, the floor planning, and financed the building of a new facility for Colonial, taking back a deed of trust on the real estate. The defendant Ford Motor Credit counterclaimed to recover the amounts asserted to be due from Colonial on the floor-plan agreement, together with related accounts, and to accelerate the amounts due under the real estate loan because of Colonial's failure to pay installments.

The trial court, before trial, issued an injunction against both defendants to prevent (1) a foreclosure under Ford Credit's deed of trust; (2) repossession of the floor-planned cars, and (3) to require the continuation of the previous floor-plan credit arrangement to provide for the purchase of cars from Ford Motor during the litigation.

The two causes of action were submitted to the jury, and the jury found for Colonial Ford against Ford Motor Company, only, on the Automobile Dealer Franchise Act claim in the amount of $210,000.00. The jury found for the defendant Ford Credit on the Dealer Act claim against it, and for both defendants on the Sherman Act cause. The jury also answered several special interrogatories.

Shortly after trial the court terminated the injunction as to the floor-planned cars in Colonial's possession, and permitted Ford Credit to repossess the new and used car inventory. The court also authorized Ford Credit to stop floor-plan financing which had been continued under the injunction. The injunction was however continued to prevent Ford Credit from foreclosing on its deed of trust, and also from executing on its judgment of $2,897,125.22 for balances due from Colonial entered on its counterclaim.

All parties have appealed. The plaintiff's points on appeal relate to the Automobile Dealer Franchise Act cause of action, and to the real estate acceleration issue. Thus Colonial urges:

> 1. There was coercion by Ford Motor under the Dealer Act.
> 2. The coercion caused Colonial to have liquidity problems and a lack of working capital.
> 3. Ford Credit is subject to the Dealer Act as a matter of law, and such issue should not have been submitted to the jury.
> 4. The instructions were erroneous as to the application of the Dealer Act to Ford Credit.
> 5. The trial court erroneously determined that there was no waiver by Ford Credit of the acceleration provisions of the real estate financing agreement.

Ford Motor Company urges in its appeal that the court's interpretation of the Dealer Act and instructions given the jury on the Act were erroneous especially as they concerned good faith and "wrongful demands." It also argues that the jury should not have been permitted to consider the acts of Ford Credit in the application of the Dealer Act to Ford Motor. Ford Motor also urges that there was no valid evidence of damages.

Ford Credit argues that it was error to continue the injunction preventing foreclosure pending appeal.

As mentioned above, the plaintiff urges that the Automobile Dealer Franchise Act, 15 U.S.C. § 1221, was applicable to Ford Motor Credit Company as a matter of law. This argument is centered on the fact that Ford Credit is a wholly-owned subsidiary of Ford Motor, and was floor-planning the cars purchased by plaintiff Colonial from Ford Motor.

The Dealer Act is directed to manufacturers, to assemblers, and to distributors of automobiles. It is further directed to the performance or termination of the franchise agreement between those so engaged and the dealers.

It is apparent from the record that Ford Credit is not a manufacturer, assembler, or distributor, and further that it had no franchise agreement with plaintiff. Thus on the face of the Act, it was not applicable to Ford Credit. *See Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59 (9th Cir.); *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 461 F.2d 608 (7th Cir.); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir.). The Act also includes any other entity ". . . which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221(a). The "acts for" or "under the control" provisions must relate to the transactions or circumstances out of which the cause of action arose. Testimony and evidence must develop these factors in each case, and the "control" must be shown to be in connection with the "distribution" of automobiles. Referring to these elements of the statute as "control," it is apparent under the Act that the development during trial is directed to actual and to practical considerations there existing. This must be the description of a fact question in ordinary circumstances, and was such a matter here. The examination of several witnesses was directed to this issue, and especially in the questioning of the official of Ford Credit who made the decision to terminate the floor planning, Mr. Thomas. The "under control"

and "acts for" elements here created a fact issue for submission to the jury. The wholly-owned subsidiary aspect was certainly a factor or an opportunity, but in the abstract it could not be a determining factor. The plaintiff centers on the financing of cars purchased from Ford Motor as part of distribution, but this is not persuasive as this position was shown to be no different from that occupied by the local bank which had previously floor-planned for plaintiff.

We find no error in the instructions given to the jury on the Dealer Act application to Ford Credit. The statutory elements were covered in the instructions, and contrary to plaintiff's arguments the acts must be directed to the franchise as above pointed out. This was covered by the instructions and necessarily related to the parties to the franchise agreement.

The fact question was thus properly submitted to the jury, and it decided it. In answer to special interrogatories, the jury responded that Ford Credit had not failed to act in good faith in its business relations with Colonial under the Act. Also it replied that the acts of Ford Credit did not prevent or make it more difficult for Colonial to meet its financial obligations to Ford Credit.

We thus find no error in the submission of the Dealer Act question as to Ford Credit to the jury, and the verdict must stand.

The plaintiff, in reference to the real estate financing, urges that the trial court should not have applied the acceleration provisions of the deed of trust and security agreement. This financing was by Ford Credit, and it is undisputed that installments were not paid by plaintiff when due in the period September 1974 until September 1975, and there was about $130,000.00 past due. In May 1975, Ford Credit sent a notice to plaintiff exercising its right to accelerate under the deed of trust and security agreement. The same month the trial court entered a temporary restraining order, followed by an injunction which

required continuance of the financing as it existed before the termination of floor-planning, which required that Ford Credit take no action to foreclose or repossess, and generally required Ford Credit to carry out its previous financial relationship with plaintiff; thus to continue to extend credit. While this injunction was in effect, plaintiff made some installment payments on the real estate. The trial court stated that the acceptance of such payments, without any satisfaction by plaintiff of the older obligations, did not establish "... a factual premise for the acceptance of waiver claimed by plaintiff." It would seem sufficient to observe that the injunction altered significantly the relationship and obligations of the parties under the deed of trust and the security agreement, and that the trial court could determine the impact of its injunction and his intent in its issuance as to the waiver issue. Thus the trial court's interpretation of the injunction as to this issue must be accepted and is accepted. The matter was then clearly outside normal business relations and outside the voluntary elements of such relations. We find nothing in *United States v. Colombine Coal Co.*, 27 Utah 2d 140, 493 P.2d 983 (Utah), or in *Swain v. Salt Lake Real Estate & Investment Co.*, 3 Utah 2d 121, 279 P.2d 709, to lead to a contrary conclusion.

The order or injunction of the trial court preventing foreclosure by Ford Credit under the deed of trust and preventing execution under its judgment is hereby set aside.

Ford Motor Company in this appeal urges that the trial court misconstrued the Automobile Dealer Franchise Act (15 U.S.C. § 1221), and failed to give certain instructions to the jury and also gave instructions which were erroneous. Ford Motor in this argument asserts that there must be a wrongful demand on the dealer coupled with a threat of reprisal related to the franchise.

Ford Motor first urges that there was no written "franchise" and Colonial was not a "dealer" until September 2, 1969. Thus acts of Ford Motor before that time cannot be a violation of the Dealer Act. However, it is apparent that several of the most significant requirements imposed by Ford Motor as conditions to be met before a franchise would be given were made before that date. It is a sufficient answer that these conditions were carried over into the formal dealership period. Two examples are the requirement that Mr. Pease be given a contract to buy into the dealership when created to the extent of forty-nine percent, and that the place of business be changed to a new location with new facilities. Ford Motor in its brief even refers to the relocation as "an inducement to being granted a franchise." Ford Motor also treats the relocation matter as "contractual."

It is clear from the record that Ford Motor required Mr. Belnap to agree to sell Mr. Pease a forty-nine percent interest in the Colonial corporation. This condition or requirement carried over into most of the pertinent period.

There were other incidents which were supported by some evidence and submitted to the jury as part of plaintiff's case to show a violation of the Dealer Act.

As indicated above, Ford Motor urges that the instructions were incomplete and erroneous as to the proof required to prove a violation of the Act. We cannot describe or analyze all the instructions here. Considering the instructions as a whole, as we must, the trial judge properly instructed on "coercion," "intimidation," and "good faith." It instructed that "good faith" was to ". . . be determined in a context of actual or threatened coercion or intimidation." *See Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir.). Also, if Ford ". . . through a series of acts, deprived [plaintiff dealer] of the right as an independent businessman to control its own business to serve [Ford Motor's] own economic interest and in disregard of [the

dealer's] interest, . . ." a violation of the Act could result. The court against this set out Ford Motor's right under the Act to "urge," "argue," "explain," "endorse," "recommend," and "persuade." The court also instructed that Ford Motor ". . . may reasonably be concerned with the management, facilities, finances and inventory of its dealers, . . . may require a dealer to adhere to reasonable standards in these areas of the dealer's operations." The instructions that Ford Motor could "require" the dealer to follow reasonable standards as to facilities and finances are clear, and correctly submitted this aspect to the jury. The court did not use the "wrongful demand"—"coercion" coupling Ford Motor urges, but this was not required to be separately treated in those words. Also we find no error in the use in the instructions of such terms as "arbitrarily," "unreasonably," or "oppressive."

We, of course, held in *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir.), that mere arbitrariness of an automobile manufacturer does not constitute a violation. The instructions before us do not constitute such a submission to the jury. *See also Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.).

We find no error in the instructions, and hold that the issues were properly submitted to the jury.

To consider only one of several elements presented to the jury, that is, the requirement that Mr. Pease be given a right to buy in the dealership, we must hold that there was sufficient evidence upon which the jury could base its verdict, having been properly instructed. It appears that Mr. Pease was placed on the scene by Ford Motor, and then inserted into the enterprise as a condition to the granting of a franchise. The Dealer Policy Board deferred action on the franchise application until Mr. Pease was given the buy-in agreement, and instructed the local representative of this. This was the period May to September 1969.

There was testimony that Ford Motor wanted Mr. Pease to have "full control."

Under the buy-in agreement, Mr. Pease apparently paid $20,000.00 down, and the balance of the large sum required to pay for the forty-nine percent interest was to come from profits from the dealership. It appears that the initial payment was withdrawn by him, although the record is not entirely clear. In any event, the jury could well infer that Mr. Pease was given a free ride in the acquisition of a forty-nine percent interest in a large dealership, all as a condition to granting the franchise. Mr. Pease was not in a position to provide additional capital for Colonial which Ford Motor found to be necessary. Thus the corporation could only look to the fifty-one percent interest owner for more capital contribution. The insertion of Mr. Pease thus created this fundamental corporate problem related to capital requirements. Mr. Pease and Mr. Belnap *both* had full managerial authority and responsibility under the franchise, both were told in mid-1974 of the need for additional capital. The buy-in agreement between Mr. Belnap and Mr. Pease provided that Mr. Pease would discharge his managerial duties in a manner acceptable to Ford Motor. There was testimony that the buy-in agreement was intended to provide Mr. Pease with control over the operation of the agency. Mr. Belnap in October 1974 negotiated Mr. Pease out of the agency, but at a time when the several problems had become so serious that the agency was failing.

Thus again, there was sufficient evidence that the requirements made by Ford Motor or conditions to granting the franchise had a direct consequence on the liquidity of the dealership. This in turn provided a basis for the damage award. Ford Motor urges that the damages were derived only from the cutoff of floor planning, but we find no support for this position. There was evidence of change in profits and volume which was adequate evidence.

The Automobile Dealer Franchise Act, 15 U.S.C. §§1221-1225, in section 1223 provides for a three-year limitation period. Three years before the date of filing the action would be May 15, 1972. *See* our opinion in *Hanley v. Chrylser Motors Corp.*, 433 F.2d 708 (10th Cir.), decided in 1970. The plaintiff argues that the limitation issue is controlled by *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77, decided in 1971. The *Zenith* case was an antitrust case under section 4 of the Clayton Act, with a four-year limitation period. Ford Motor argues that *Zenith* is not applicable to this type of case, and in any event, that any prelimitation incidents were brought with the *Zenith* exceptions by the plaintiff and refers particularly to the Belnap-Pease buy-in agreement. Ford Motor in its brief states:

> "Thus even assuming that Colonial ever had a claim for the alleged transfer of control from Belnap to Pease, the last alleged act of Ford was to force the signing of the Belnap-Pease agreement. The execution of that agreement was 'by its nature permanent at initiation without further acts.' "

The parties cite *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir.); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir.); and *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir.).

The control-liquidity problems were developed in the record. There was testimony as to several reasons why the problem arose in the dealership which are not mentioned in this opinion, but upon which the jury could well have based its verdict. There was evidence sufficient to establish, for the jury, a causal connection between the size or cost of the new location and facilities, and the problem; and similarly the testimony as to inventories, parts, flooring expense as related to inventory, and others. The liquidity problem existed, and was at its worst in the 1972-1974 period. As

indicated, Ford Motor complained about the problem to plaintiff several times during the first half of 1974.

We see no reason why the doctrine announced in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct 725, 28 L.Ed.2d 77, as to the period of limitations, should not be here applied. The acts of the manufacturer sought to be reached under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221, are so comparable to the acts condemned in the antitrust treble damage statutes that the same considerations should be used in the application of the limitation provisions. It is apparent that the Court in *Zenith* was speaking only to the antitrust action when it expressed the basic accrual of a cause of action, and availability of proof connection upon which the decision was based. Thus the Court said:

> "In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."

The proof of damage problem as to the liquidity-management claims obviously was the same as in *Zenith*.

The courts in cases following closely in time the *Zenith* decision have said as in *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir.), an antitrust action:

> "... However, if the district court should find that some portion of Waterman's damages were too speculative to be ascertainable at the time the overt act which produced them occurred, then those damages which become ascertainable within the four years

> prior to the filing of the complaint will be recoverable."

Also in *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir.), which was a patent case with a claim by dealers that the patent could not be enforced because of patent misuse through antitrust violations, the court said:

> "For these reasons we hold that Louisville [a dealer] is entitled to recover threefold those damages for the period beginning on May 31, 1964 which could not be proved with reasonable certainty in late 1963 [the date of termination of the distributorship]."

A similar statement appears in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir.), an antitrust action, where the court said:

> "The authorities cited above establish that continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action."

The court continued and said in substance that a "newly accruing claim for damages" requires an act occurring within the period.

Thus we must hold that the pre-limitation period acts such as the relocation requirement and the Pease requirement, and others, were of such a nature that damages could not have been ascertained until an extended period of time had elapsed. The event which initiated the conditions, that is, the signing of the buy-in agreement or the agreement to the location change requirement, of course, took place at a fixed day and time of day, but the consequences in terms of ascertainable or probable damages under *Zenith* did not give rise to a cause of action until much later, and

within the three-year period. Thus the "action for damages" accrued within the limitation period expressed in the Dealer Act.

The judgment of the trial court is in all respects AFFIRMED.

McKAY, Circuit Judge, concurring in part, dissenting in part:

I concur in the opinion of the court on all issues except one. I disagree with its conclusion that there was sufficient factual evidence to support the jury's determination that Ford Motor Credit Company was not subject to the Automobile Dealer Franchise Act under the circumstances of this case. The Act covers automobile manufacturers, assemblers and any other entity "which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221 (1976). First, in light of the broad remedial purposes of the Act, it is my view that the element of "control" is conclusively established by the showing that Ford Credit is a wholly owned subsidiary of Ford Motor. Second, with the facts presented in this case, Ford Credit's involvement is shown to be exclusively for the purpose of facilitating the distribution of automobiles manufactured by its parent manufacturer and assembler. I do not believe there was any evidence to support a contrary determination by the jury with or without proper instructions.

Opinion on Rehearing of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 76-2079, 76-2080 and 76-2083

COLONIAL FORD, INC, a Utah Corporation,
Plaintiff, Appellee, Cross-Appellant,

v.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant, Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,
Defendant, Appellant, Cross-Appellee

(Decided February 5, 1979)

Peter W. Billings, Stanford B. Owen and *Peter W. Billings, Jr.*, of *Fabian & Clendenin*, Salt Lake City, Utah, for defendant-appellant Ford Motor Co.

Harold G. Christensen and *R. Brent Stephens*, of *Snow, Christensen & Martineau*, Salt Lake City, Utah, and *George V. Burbach*, Dearborn, Mich., for defendant-appellant and cross-appellee, Ford Motor Credit Co.

Daniel L. Berman, Richard W. Giauque and *Gordon Strachan*, of *Berman & Giauque*, Salt Lake City, Utah, for plaintiff-appellee and cross-appellant Colonial Ford, Inc.

Before SETH, Chief Judge, and DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

We have granted Ford Motor Company's petition for rehearing because we may have understated a significant element of the case. While we believe some clarification of

our prior opinion[1] is in order, except as clarified herein our prior opinion with respect to the dispute between Ford Motor Company and Colonial is reaffirmed.

We also have granted Colonial Ford, Inc.'s petition for rehearing. We conclude that a new trial should be granted with reference to the issue of whether Ford Motor Credit Company is liable to Colonial for acts allegedly done in violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976).

FORD MOTOR COMPANY PETITION FOR REHEARING

In our original opinion, reported at 577 F.2d 106, we pointed out that Ford Motor insisted that Marshall Pease be given the right to acquire a forty-nine percent interest in the automobile dealership. The record also shows that Ford demanded as a condition to the franchise that Pease be given absolute control of the enterprise. This position was asserted in meetings between Robert Parr of Ford and LeGrande Belnap of the dealership. Ford's Dealer Policy Board took the status of the franchise under advisement pending a resolution of these ownership and control issues. Belnap, who had by this time acquired a large investment in the enterprise, was under significant pressure to have the franchise issue resolved. The Board nonetheless deferred action on the franchise until all conditions and demands were complied with, including the requirement that "Marshall Pease [be] given a buy-in by Belnap." It appears that on July 9th, Parr advised Belnap that Ford Motor required for reinstatement of the franchise that Pease be given control of the dealership and a forty-nine percent buy-in that was to be paid from profits. Although Belnap strongly opposed the buy-in requirement, to protect his

1. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th cir. 1978).

investment, he ultimately had to agree. The record shows that Pease paid $20,000.00 down on the buy-in contract and thereafter withdrew this amount from the dealership. Ford Motor's absolute requirement meant that Pease received a free ride to a forty-nine percent interest in a large dealership—which interest, of course, reduced Belnap's ownership share. Ford Motor would have us attach no consequence to Belnap's loss. In its petition for rehearing, Ford states: "There is no reason why the reduction of Belnap's stock ownership from 100% to 51% prevented him from providing additional working capital." We are not persuaded.

The dealership control arrangement was not a "management" aspect of the dealership in which Ford would have a legitimate interest, but instead was a requirement for the transfer of "ownership" to a particularly favored person. It is obvious that the position would be more attractive to a manager with ownership, but the matters are nevertheless separate. The record does not indicate the exact reason why Pease was to be placed in such a position, but it is clear that it was entirely the idea of Ford Motor and was resisted by Belnap until it became impossible to continue opposition.

Ford Motor takes the position that these events happened before a new franchise was issued. It is true these events occurred during the dealership's operation in the hiatus between Ford's notice of franchise termination to Petty Ford, Inc.—the dealership Belnap had acquired—and Belnap's formally executing his franchise agreement with Ford. Ford contends that this chronological circumstance makes the Pease buy-in a matter of "contract," and that, as a result, Ford could use the franchise to enforce everything which had gone on before. Ford apparently would consider irrelevant the pressures and coercion applied prior to

formal execution of the "new" franchise: all became regularized by the franchise; all became purified as "contractual."

We cannot agree that the timing of franchises can be so manipulated to regularize improper and coercive demands and to avoid the consequences of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). These pre-franchise events described above necessarily became involved in the franchise, and the Act was violated by Ford's demands for what it blandly described as "contractual performance." The bad faith of Ford Motor Company thus carried over into the franchise and permeated the entire relationship.

COLONIAL FORD'S PETITION FOR REHEARING

Ford Motor Credit is a wholly owned subsidiary of Ford Motor Company. Its primary business is financing the distribution of Ford automobiles by providing Ford dealers with capital. Approximately 90 percent of its multibillion dollar financing was in this enterprise; the remaining 10 percent was invested in nonautomotive loans. It is the conduct of Ford Motor Credit in providing financing to Colonial which forms the basis of the complaint against the financing subsidiary in this case. The particular issue before us on rehearing is whether Ford Motor Credit is subject to the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). The Act authorizes federal court actions by automobile dealers for bad faith acts by automobile manufacturers. An "automobile manufacturer" is defined to include "any person, partnership, or corporation which acts for and is under the control of such manufacturer . . . in connection with the distribution of . . .

automotive vehicles." 15 U.S.C. § 1221(a). We must determine whether Ford Motor Credit comes within the scope of this inclusive definition.

The trial court submitted the question of the Act's applicability to the jury with an instruction which in effect made "control" depend on specific overt acts in the actual transactions with Colonial. Colonial argues that a wholly owned subsidiary which acts for a manufacturer in connection with distribution of automobiles is subject to the Act as a matter of law and that the jury should have been so instructed. We agree.[2] In light of the broad remedial purposes of the Act, the element of "control" is conclusively established by a showing that Ford Motor Credit was a wholly owned subsidiary of Ford Motor and that its involvement with Colonial was exclusively for the purpose of facilitating the distribution of automobiles manufactured by its parent.[3]

The Act is designed to curtail the kinds of coercion and intimidation of retail dealers by manufacturers made possible by the parties' relative economic inequality. *Woodard v. General Motors Corp.*, 298 F.2d 121, 127 (5th Cir.), *cert. denied*, 369 U.S. 887, 82 S.Ct. 1161, 8 L.Ed.2d 288 (1962);

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2. The only question for the jury under the Act was whether Ford Motor Credit conducted itself in good faith in its relationship with Colonial. While the good faith issue was submitted to the jury in the trial below, it was submitted by means of a special interrogatory which permitted the jury to reach a conclusion based either on whether good faith actually existed or on whether the Act applied at all. The interrogatory read:

> State whether the defendant Ford Motor Credit Company failed to act in good faith in its business relations with Colonial Ford, in violation of the Dealer Day in Court Act.

Brief of Ford Motor Credit Co., at 3.

3. A jury question may be presented if the requisite element of control is alleged on a basis other than corporate parental ownership. For example, a bank that is not a part of the manufacturer's corporate empire may be alleged to be under the manufacturer's control for purposes of the Act. The question would be one for the trier of fact. *See, e.g., Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 441-42 (1st Cir.), *cert. denied*, 385 U.S. 919, 87 S.Ct. 230, 17 L.Ed.2d 143 (1966).

DeCantis v. Mid-Atlantic Toyota Distributors, Inc., 371 F.Supp. 1238, 1241 (E.D.Va. 1974). The most obvious point of leverage in the manufacturer-dealer relationship is financing. When, as in this case, a manufacturer uses a wholly owned subsidiary to facilitate that financing, it brings the subsidiary within the remedial purposes of the Act whether or not it is shown that the manufacturer ordered the specific conduct complained of. It would be unrealistic to suppose that a wholly owned subsidiary working to facilitate the parent's distributive activities would act other than to promote the desires of its parent. Thus the Act's "control" requirement is satisfied by showing corporate ownership and confluence of interest.

We find support for our position in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). In that case, a Chrysler sales subsidiary was held to be a manufacturer under the Act even though its only activity was to distribute automobiles manufactured by its parent. This result was reached despite the fact that each corporation was legally independent and operated in its own sphere. *Id.* at 791. The court analyzed the issue as follows:

> The $107,000 judgment was entered against Chrysler Corporation and Chrysler Motors Corporation. Chrysler Corporation manufactures the automobiles but sells them only to Chrysler Motors Corporation, its wholly-owned sales subsidiary. Chrysler Motors has sole responsibility for distribution and marketing of Chrysler products, and it is this corporation alone which enters into franchise contracts with automobile dealerships.
>
> Clearly both Chrysler Corporation and Chrysler Motors are automobile manufacturers as defined in the Act. Chrysler Motors is such because it is a "corporation which acts for and is under the control of such manufacturer or assembler [Chrysler Corporation] in connection with the distribution of said automotive vehicles." 15 U.S.C.§ 1221(a). Either

> could be sued for failure "to act in good faith in performing or complying with any of the terms or provisions of the franchise." 15 U.S.C. § 1222.[4]

447 F .2d at 791. The *Chrysler* case did not employ a specific transactional analysis of the Act's application. Instead, it focused on the general functional relationship between the parent and the subsidiary. We take the same approach here. We hold that the Act's provisions did apply to Ford Motor Credit. We therefore order a new trial on the question of Ford Motor Credit's liability to Colonial under the provisions of the Act.

In addition, we expressly reaffirm our earlier conclusion that the acceptance of certain real estate installment payments by Ford Credit did not give rise to a waiver of its claims. We conclude, however, that the injunction ordered to remain in effect pending appeal—which injunction we previously indicated would be set aside—should be preserved until, upon remand, the district court is able to determine what remedial relief might be appropriate in light of today's decision. Subject to the opinion of this court as modified on rehearing, the fashioning of appropriate remedies is a matter that should be left to the court below.

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4. The court went on to suggest that a further requirement for suit was that the defendant manufacturer have a contractual relationship or agreement with the dealer. 447 F.2d at 791. In the instant case, it is unquestioned that Ford Motor Credit had entered into a contractual relationship with Colonial.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
JANUARY TERM — FEBRUARY 5, 1979

Nos. 76-2079, 76-2080, 76-2083
(D.C. No. C-75-190)

COLONIAL FORD, INC., a Utah Corporation,
Plaintiff-Appellee, Cross-Appellant,

vs.

FORD MOTOR COMPANY, a Delaware Corporation,
Defendant-Appellant,

and

FORD MOTOR CREDIT COMPANY,
a Delaware Corporation,
Defendant-Appellant, Cross-Appellee.

Before Honorable OLIVER SETH, Chief Judge, Honorable WILLIAM E. DOYLE and Honorable MONROE G. MCKAY, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah and was submitted on the briefs at the direction of the Court.

Upon consideration whereof, it is ordered that the judgment of that Court is affirmed in part and reversed in part. The cause is remanded to the United States District Court for the District of Utah for a new trial with reference to the issue of whether Ford Motor Credit Company is liable to Colonial Ford, Inc., for acts allegedly done in violation of

the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). Further proceedings shall be conducted consistent with the original opinion of this Court filed May 31, 1978, as clarified by the opinion on rehearing filed this date.

It is the further judgment and order of this Court that the injunction to prevent Ford Credit from foreclosing on its deed of trust, and also from executing on its judgment of $2,897,125.22 for balance due from Colonial entered on its counterclaim, which the trial court ordered to remain in effect pending appeal, should continue, upon remand, until the District Court is able to determine what remedial relief might be appropriate in light of the opinions of this Court rendered May 31, 1978, and February 5, 1979.

/s/HOWARD K. PHILLIPS

Howard K. Phillips, *Clerk*

Order of the Court of Appeals upon Petitions for Rehearing and Suggestions for Rehearing In Banc

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and

FORD MOTOR CREDIT COMPANY,
a Delaware Corporation,
Defendant-Appellant, Cross-Appellee.

Before Honorable OLIVER SETH, Chief Judge, Honorable WILLIAM J. HOLLOWAY, JR., Honorable ROBERT H. MCWILLIAMS, Honorable JAMES E. BARRETT, Honorable WILLIAM E. DOYLE, Honorable MONROE G. MCKAY, and Honorable JAMES K. LOGAN, Circuit Judges.

This matter comes on for consideration of the petitions of Ford Motor Company and Colonial Ford, Inc., for rehearing and suggestions for rehearing en banc filed June 14 and June 15, 1978, respectively.

The petition for rehearing of both parties was resolved by Judges Seth, Doyle and McKay, who heard the appeals. On September 27, 1978, they granted rehearing without oral argument and on the existing briefs.

Through inadvertence and clerical oversight, the order on the granting of the petitions for rehearing was not formally entered.

Thereafter no judge in regular active service or a judge who was a member of the panel that rendered the decision requested a vote on the suggestions for rehearing en banc by the parties.

Upon consideration whereof, and in order to correct the clerical oversight, the Court orders, as follows:

1. Ford Motor Company's petition for rehearing is granted as of September 27, 1978, on the existing briefs.

2. Colonial Ford, Inc.'s petition for rehearing is granted as of September 27, 1978, on the existing briefs.

3. The suggestions for rehearing en banc by Ford Motor Company and Colonial Ford, Inc., there being no request by any qualified judge of the Court for a vote on such suggestions, are hereby denied.

4. The judgment entered on May 31, 1978, is vacated. The opinion of Judge Monroe G. McKay on rehearing is ordered filed this date.

5. The opinion of the Court filed May 31, 1978, with respect to the dispute between Ford Motor Company and Colonial Ford, Inc., is, as clarified in the opinion on rehearing on appeal filed February 5, 1979, reaffirmed.

6. Judgment is entered in accordance with the opinion filed in the captioned cause on May 31, 1978, as clarified by the opinion on rehearing filed February 5, 1979.

/s/HOWARD K. PHILLIPS

Howard K. Phillips, *Clerk*